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CAPITALISM, THE UNITED STATES CONSTITUTION AND THE SUPREME COURT

By HUGH EVANDER WILLIS*

The nineteenth century, which roughly corresponds to the period of maturity of Anglo-American law, was chiefly noted for the protection of property and contract, the growth, especially in the United States, of the corporate form of business organization, and the final development of the capitalistic system. This century, also, was the great century of constitutional development in the United States. An interesting question for legal study is whether or not these two developments have merely been concurrent, or whether there has been some relation between them.

CAPITALISM

Capitalism has been defined as a system of free, individualistic enterprise which allows and fortifies the accumulation of wealth.¹ It is an economic system based on competition for private profit. This definition is perhaps not quite accurate as applied to that form of capitalism which has been developed by the modern form of corporate organization, but it is a good general definition of historical capitalism. The chief characteristics of capitalism have been the following, and the first four are named in the order of their historical origin: (1) Private property; (2) Contract and freedom of contract; (3) Indus-

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¹Lerner, *The Supreme Court and American Capitalism*, 42 Yale Law Jour. 668, 678.

trialism, including the factory, the machine, mass production, the city, and the integration of the labor class; (4) Business, including the corporation, credit structure, investment banking, and marketing; (5) The profit motive; and (6) Individualism, including freedom to choose any business or profession, freedom to run such business or profession without social interference, freedom of competition, and freedom to keep any advantages acquired. However, it should be noted that the third and fourth characteristics are not necessarily peculiar to capitalism. They might also characterize other systems.

Capitalism has not been a static, but a growing, changing thing. In the United States, it may be divided into four main periods: (a) The pre-industrial, or agricultural period, prior to 1840; (b) The corporate industrial period, from 1840 to 1880; (c) The period of corporate monopoly, from 1880 to the time of the World War; and (d) The period of corporate finance, from the time of the World War up to date. The first period was characterized by its emphasis of property and contract. The second period still emphasized these things, and in this period there had not as yet developed a property-less class; but the second period did witness the emergence of a labor class. The third period was characterized by the emergence of various business classes and an inner cleavage among them, and the growth of the modern trusts. The fourth period was characterized by the separation of ownership from management, the appearance of banking control of industry, and the dominance of the promoter.

The modern corporation is a major social institution. One corporation is likely to be large enough to be an economic empire. All of the corporations together are as embracing as the feudal system. The corporation has powerful relations with workers and production, with customers and with the government itself. The corporation is a device which has accomplished three purposes. The first and earliest purpose was to provide a means through which the private business transactions of individuals could be carried on. The second purpose was to provide a method of property tenure. With the advent of quasi-public corporations the unity of ownership and power which formerly was called property was destroyed. This was not a necessary incident of the corporation but it has been a chief

characteristic. It was brought about by the multiplication of owners through the public market for securities and the use of the proxy and other devices by those seeking power. The third purpose of the corporation is the recent one of organizing our economic life through the mobilization of property interests, the concentration of wealth, the surrender of control by the investors and the power acquired by the directors of industry.

The concentration of economic power in the United States is only equalled by the concentration of political power in our national state. But we have not as yet subjected the first to the same test of public benefit to which we have subjected the second. In 1930 two hundred non-banking corporations controlled forty-nine per cent of the corporate wealth, other than banking, thirty-eight per cent of the business wealth other than banking and twenty-two per cent of all wealth. The interests of these corporations are so diversified that every individual comes into contact with them either as shareholder, employee or consumer. The growth of the large corporations has been the most rapid. If the recent growth should continue, by 1950 seventy to eighty-five per cent of all corporate activity would be controlled by two hundred corporations. The means whereby large corporations are acquiring this concentration of economic power are the reinvesting of earnings and the sales of securities to the investing public and mergers. These huge corporations dominate our major industries, and have the power to control production and set aside the blind economic forces on which people have been led to believe they could depend.

The dispersion of stock ownership has been a recent phenomenon and a continuing process. In the largest railroad (the Pennsylvania) the largest public utility (the A. T. & T.) and the largest industry (United States Steel) the principal owner now owns less than one per cent of the outstanding stock. When this result is reached the ownership may be called public ownership. The dispersion of stock ownership is progressing among corporations of medium size. Often the largest owner of stock is a second corporation whose stock is widely owned as in the case of the Electric Bond and Share Company. This result was brought to pass largely through the encouragement of employee owners and customer owners. The corporation turned to these classes at one time because of federal taxes. Now that

federal taxes have been lowered, corporations are perhaps not pushing this form of ownership so much. In 1927, forty-five per cent of corporate stock was owned by people of moderate means. Recently, one-half of the savings of the community have gone into corporate securities. No other fields are likely to supplant this field. Real estate and foreign loans do not threaten serious competition. Hence, it is a safe guess that the dispersion of stock ownership will continue as soon as people begin again to save and that they will invest either directly or indirectly in the stock of insurance companies, banks and trust companies. The depersonalization of ownership has become so mobile that a corporation seems to have an independent life as if it belonged to no one.²

THE CONSTITUTION AND THE SUPREME COURT

Law is a scheme of social control established in the United States by the people as a whole for the purpose of creating a better social order, either of social happiness or racial perfection, through the delimitation of personal liberty for the protection of social interests.

Constitutions are fundamental law setting up the framework of government to exercise the social control called law, delegating to the branches of government the powers to be exercised by them and placing limitations on such exercise of powers to protect personal liberty against more social control than it is thought ought to be exercised.

The United States Supreme Court has not only itself created the larger part of our Constitution, but has taken to itself as a part of its judicial power the function of making the federal Constitution accomplish the purpose of its establishment.

Capitalism is a form of economic personal liberty and, therefore, so long as we have social control, should, like any other form of personal liberty, be subject to social control if social control rather than personal liberty would be better for our social order.

What has been the relation between capitalism and the Constitution? Under our fundamental law, has social control been

² Berle and Means, *The Modern Corporation and Private Property*. The figures on corporations given herein are taken from Berle and Means' Book.

applied to capitalism or has capitalism been free from social control? Has capitalism changed and developed with or without direction by the Supreme Court? Has the Supreme Court, in other words, refrained from interfering with or co-operated with, or found itself unable to cope with corporations? What has been the attitude of the Supreme Court toward such characteristics of capitalism as private property, freedom of contract, individualism and the profit motive? Whatever the Supreme Court has done or has not done, has it pursued the right course, or should it have pursued a different course? What is likely, to be the course of the Supreme Court in the future?

ORIGINAL CONSTITUTION

The original Constitution of the United States, as it was drafted in the Constitutional Convention, apparently had as some of its main objects the protection of private property and contract and the securing of individual liberty. That one of its objects was the protection of private property and contract is shown by the provision in Article VI that "All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation"; by the provision in Section 2 of Article IV that "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due"; by the provision in Section 8 of Article I that Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; by the provision in Section 9 of Article I that "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808"; and by the provision in Section 10 of Article I that no state shall "make anything but gold and silver coin a tender in payment of debts," or pass any "law impairing the obligation of contracts," or "without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." That another one of its objects was the protection of per-

sonal liberty is shown by the provision in Section 2 of Article IV that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and by the nature of the framework of government set up by the Constitution. This Constitution set up both a dual form of government and a separation of the federal government into three different branches, the legislative, the executive, and the judicial. Not content with this separation of powers, the drafters of the Constitution gave to each one of the branches of government some of the powers which would appropriately belong to the other branches of government, so that each one would be a check on the other; and not content with this, it set up two branches for the legislative branch of government, so that whatever one body of men undertook to do, the other body could prevent it from doing. The effect of this form of government, it has been said, was to "guarantee to a whole nation that they never could be governed at all. And that is exactly what they wanted." Undoubtedly, at the time of the drafting of our original Constitution, there was a great deal of fear of government and a great deal of love of liberty and property; and the drafters of that document thought that one of the best protections of liberty and property was to so hamstring the government that it could not interfere with liberty and property. In the original Constitution, for the most part, this was not done by constitutional guaranties and limitations, but by the scheme of checks and balances set up therein. However, this protection of liberty did not seem to be enough for the patriots of our early day. Evidently, they feared that the government might, in some way, break the strings by which it was bound, and, therefore, almost immediately, a great many other constitutional limitations and guaranties were introduced in the form of amendments to the original Constitution for the purpose of protecting personal liberty and property. These limitations were not based upon any theory of natural law, as the Declaration of Independence was, and as some later decisions of the United States Supreme Court came very close to being, but upon the theory that the sovereign people were protecting themselves against the usurpation of power by the various agents and agencies which they had set up. The result of such a scheme for the protection of personal liberty against imaginary political dictators was that, in the course of

time, instead even of protecting personal liberty, it developed a state of society in which various people like the ward healer and the financier clothed with constitutional protection became the worst sort of dictators without responsibility.

While personal liberty and property and contract received great protection under the original Constitution and the first amendments thereto, the protection thus afforded was negative in character rather than positive. It kept government from interfering with capitalistic development, but it did not actively co-operate with capitalism to aid its development.

SUPREME COURT

Most of our United States Constitution, as we strangely are only recently beginning to realize, has been made by the United States Supreme Court, either by interpreting provisions written into the original Constitution, or by the development and addition of new constitutional doctrines. So far as concerns our capitalistic system, the United States Supreme Court in its work has not been merely negative, it has given some creative, positive direction to it. There has been a great deal of criticism of our courts for their legal lag, and it has been said that even the United States Supreme Court has failed to adjust itself to economic growth. There is only a half truth in this. The other half of the truth is that law is as much a growth as economics. Sometimes this growth is concealed by fictions, but even fictions are vehicles of change. Of course, some constitutional development has been the result of the impact of capitalistic development. Capitalism has both posed problems for the Supreme Court and has conditioned the answers. It has pushed before the Supreme Court the various clashes of interest, like those between employees and employers, between various groups of business men, between the consumers and public utility groups, between the agricultural and the industrial groups, between ownership and control groups, within the corporate structure itself, between autonomous business control and state enforced competition, between individual enterprise and collective control, and between property interests and human interests. But the Supreme Court in deciding the issues between the varying clashing groups of the capitalistic system, has been more than a mere spokesman for capitalism; it has given positive direction to many of the things

found in the capitalistic system. The growth of each has been interwoven with and conditioned by the other. Constitutional law is best understood when it is read in the light of capitalism, and capitalism is best understood when it is read in the light of constitutional law.

The Supreme Court of the United States, therefore, has been an agency of social control. The social control which it has established has been due somewhat to the economic views of the judges, but more to the fact that the judges are members of our social order and a social product. The decisions of the judges, of course, are influenced by the legal technic or rhetoric which they use and to the personal differences which they have, but they are due more to the capitalistic system and the world of ideas in which the judges live. Hence, if there is a desire to change the decisions of the Supreme Court, the best way to do so would be to change the current ideologies. To this extent, the Supreme Court has only registered its approval of the work of capitalism. But the Supreme Court has been more than this. It has been more than an arbiter between the states and the federal government and between the various branches of the federal government. It has been an arbiter between the various economic forces. In the *Dred Scott* decision³ it tried a little too early to give direction to economic forces and failed, but later became the *modus operandi* of business. Where it desired, it checked the forces opposed to capitalistic expansion; and where it desired, it checked the forces of capitalistic expansion. It has had economic affiliations and has been creative more than submissive.

CONTRACT CLAUSE

The first work of the Supreme Court with reference to our capitalistic system was in connection with the protection under the obligation of contract clause in the United States Constitution. This occurred in the period of Chief Justice Marshall, and thereafter was gradually stopped, but there is some indication of a recent revival of this protection.⁴ This protection of property and contract took the form of a limitation on the power of the states. It was a tradition holding over from the Constitutional Convention. It was a part of the Federalist faith.

³ *Dred Scott v. Sandford* (1857), 19 How. 393.

⁴ *Coolidge v. Long* (1931), 282 U. S. 582.

As a consequence, the protection of private rights and the development of federal power were more than two concurrent phenomena. There was a relation between them. The Federalists had the notion that state legislatures were dangerous. In this period, however, private property was not on the defensive. The frontier exalted property. The Jacksonian Revolution did not have as its purpose the overthrow of property, and the federal judges increasingly conscripted Jefferson's ideology of a natural law to protect property and to limit the state legislatures.

In the case of *Fletcher v. Peck*,⁵ the Supreme Court, under the contract clause, protected land titles against the action of a state to avoid them for fraud, by holding that the protection of the Constitution included grants or executed contracts as well as executory contracts, in spite of the fact that the Constitution forbids only the impairment of the *obligation* of contracts.

But the greatest use of the contract clause was in connection with the protection of the charters of private corporations. This protection was first extended in the celebrated Dartmouth College case.⁶ In this case, the Supreme Court, in an opinion written by the great Chief Justice Marshall, held that a charter of a charitable corporation was not only a contract rather than a mere repealable act of a legislature, but that as a contract it was free from the exercise by the state government of the great police power, the power of taxation, and perhaps even the power of eminent domain which had been delegated to the legislatures as agents of the people. The doctrine of this case was soon extended to private business corporations.⁷ This rule gave private corporations greater protection than had ever been given to private contracts which had always been held to be subject to the exercise of the power of eminent domain, the power of taxation, and the police power.⁸ Of course, the decisions of the United States Supreme Court protected all contracts, but the doctrine of the Dartmouth College case protected corporations to a greater extent than it protected private persons. The re-

⁵ (1810), 6 Cranch 87.

⁶ (1819), 4 Wheat. 518.

⁷ *Bridge Proprietors v. Hoboken Co.* (1864), 1 Wall. 116; *Piqua Bank v. Knoop* (1853), 16 How. 369.

⁸ *Munn v. Illinois* (1876), 94 U. S. 113; *Manigault v. Springs* (1905), 199 U. S. 473.

sult of this was the practical protection of private corporations against political action by the states for fifty years. This had much to do with the amazing development of corporations in the United States and the resulting corporate civilization which has come to pass. It gave corporations such an advantage that gradually corporate ownership succeeded private individual ownership; corporate management of business succeeded private management; the ownership of corporate stock gradually became more and more scattered until at last corporate ownership and corporate management were separated; and along with this development there grew up all sorts of corporate abuses. Promoters and financiers took advantage of the protection of the contract clause not only to aggrandize the corporation, but for the aggrandizement of certain favored individuals inside of the corporation.

The protection given to corporations by the Dartmouth College case and the cases following it was evidently a little too much for the country in that stage of its development, and various efforts were made to limit the scope of the doctrine.

The first limitation on the doctrine of the Dartmouth College case was that made by the rule of strict construction. This rule was introduced by Chief Justice Taney in the case of *Charles River Bridge v. Warren Bridge*,⁹ and it was followed by a number of subsequent cases.¹⁰ By the rule of strict construction, the states were allowed to do a great many things without violating the charter granted to a corporation. In the Charles River Bridge case, for example, the state of Massachusetts was allowed to incorporate a second bridge company to build a free bridge (after six years) within a few rods from a bridge built by a corporation which had previously been incorporated to build a toll bridge across the Charles River for forty years, on the theory that strictly construed the first charter did not give it an exclusive franchise. Of course, the rule of strict construction did not avail a state where a corporate charter was carefully drawn, and thereafter corporations were more careful to see that their charters were more carefully drawn.

The second limitation put upon the Dartmouth College case

⁹ (1837), 11 Pet. 420.

¹⁰ *Fertilizing Co. v. Hyde Park* (1878), 97 U. S. 659; *Stein v. Bienville Water Co.* (1891), 141 U. S. 67; *Knoxville Water Co. v. Knoxville* (1906), 200 U. S. 22.

was by the reservation incorporated in constitutions and general laws of the power to alter or repeal charters. The Supreme Court held that, where there was such provisions in constitutions or general statutes, they became terms in the contract and, therefore, subsequent legislation or repeal, did not impair the obligation of a contract.¹¹ However, not all the states had such provisions, and, of course, such provisions would only apply to subsequently incorporated corporations.

The third limitation on the Dartmouth College decision was made by the Supreme Court itself. Dissenting judges had always contended that a state could not legally abrogate the sovereign powers of eminent domain, taxation, and police power.¹² A majority of the Supreme Court finally held that the power of eminent domain could not be bartered away and that all charters were subject to the exercise of this power.¹³ A little later, after the personnel of the bench had been changed and the dissenting Justice Miller had been joined by Chief Justice Waite, Justice Harlan and others who agreed with him, the court held in a series of difficult cases which came before it that charters were subject to the exercise of the police power, first, as to public morals,¹⁴ then as to public health,¹⁵ then as to public safety,¹⁶ and finally, as to economic social interest.¹⁷ This meant that contracts were subject to the exercise of the police power, except in the case of the rates of public utilities and franchises of public utilities.¹⁸ As yet, the Supreme Court has not made the contracts of corporations subject to the power of taxation.¹⁹

¹¹ *Greenwood v. Freight Co.* (1882), 105 U. S. 13.

¹² *Washington University v. Rouse* (1869), 8 Wall. 439; *Trustees of Dartmouth College v. Woodward* (1819), 4 Wheat. 518; *Piqua Bank v. Knoop* (1853), 16 How. 369.

¹³ *West River Bridge Co. v. Dix* (1848), 6 How. 507.

¹⁴ *Stone v. Mississippi* (1880), 101 U. S. 814.

¹⁵ *Butchers, etc., Co. v. Crescent City Co.* (1884), 111 U. S. 746.

¹⁶ *Texas, etc., Co. v. Miller* (1911), 221 U. S. 408; *New Orleans v. Louisiana Light Co.* (1885), 115 U. S. 650.

¹⁷ *Illinois Central Ry. Co. v. Illinois* (1892), 146 U. S. 387.

¹⁸ *Detroit v. Detroit Citizens Ry.* (1902), 184 U. S. 368; *Cleveland v. Cleveland City Ry.* (1904), 194 U. S. 517; *Vicksburg v. Vicksburg Water Works Co.* (1907), 206 U. S. 496; *Columbus, etc., Co. v. Columbus* (1919), 249 U. S. 399.

¹⁹ *Lake Superior, etc, Mines v. Lord* (1926), 271 U. S. 577; *Roberts, etc., Co. v. Emmerson* (1926), 271 U. S. 50; *Millsaps College v. Jackson* (1927), 275 U. S. 129. But a state can acquire the power to tax a corporation by requiring the relinquishment of constitutional protection as a condition of granting a privilege, or, where there has been a

Except for taxation and the franchises and the rates of public utility companies, the Supreme Court has now ceased to give corporations any protection which it does not extend to natural persons, but it still protects both corporations and natural persons against any impairment of the obligation of their contracts not rationalized as an exercise of the police power or the power of taxation or the power of eminent domain. With the development of other clauses in the United States Constitution, the contract clause began somewhat to wane after the Civil War, although, as we have already indicated, there is some evidence that it is about to have another revival.

Protection of freedom of contract as distinguished from protection against the impairment of the obligation of a contract was not given people in the United States under the contract clause, although this consummation almost came to pass. In the case of *Sturges v. Crowninshield*²⁰ the court held a prior contract was protected against a subsequent state insolvency law, which, of course, did not protect the freedom of contract; but in the case of *M'Millan v. M'Neil*, decided in the same year,²¹ the court by way of dictum at least held that the contract clause guaranteed freedom of contract. However, in the case of *Ogden v. Saunders*²² the court repudiated this dictum. This was the one constitutional decision in which Chief Justice Marshall dissented, and there were two others who dissented with him. Chief Justice Marshall, if he could have had his way, would have written into our Constitution at this time a guaranty of freedom of contract. Thus, it was only by a narrow margin that freedom of contract was not protected by the obligation of contracts clause. This protection was undertaken too soon. Later on, under the due process clause, of course, it obtained more protection than Marshall desired to give it under the contract clause.²³

COMMERCE CLAUSE

Another place where the United States Supreme Court has

reservation of the power to amend, of not taking back a privilege (provided due process does not apply). 27 Ill. L. Rev. 908.

²⁰ (1819), 4 Wheat. 122.

²¹ (1819), 4 Wheat. 209.

²² (1827), 12 Wheat. 213.

²³ Sharp, *Movement in Supreme Court Adjudication*, 46 Harv. Law Rev. 361, 366.

come into touch with our capitalistic system has been in connection with the commerce clause of the United States Constitution.

The commerce clause has operated to protect capitalism from social control by the states. While capitalism has escaped social control to a considerable extent because of the rivalry between different states, as in the case of exemption from income taxation, liberal laws as to incorporation, and the absence of child labor laws, on the whole, if the states were free to tax and regulate corporations engaged in interstate and foreign commerce, capitalism would probably have had more social control from the states than it has had from the federal government, where the states are inhibited from action, but action is permitted to the federal government. In other words, there has been more likelihood of the protection of property and the other essential characteristics of our capitalistic system by the federal government than there would have been by the states.

The states, by the original Constitution and Supreme Court decisions, are denied any power over foreign commerce. They cannot exercise any police power with reference to it and they are prohibited from exercising a taxing power so long as goods imported are in the original package.²⁴

In the matter of interstate commerce, also the states have had very important limitations put upon their exercise of the police power. At first, they were allowed more power than they were later allowed. While the United States Supreme Court apparently at first took the position that the power over interstate commerce was a concurrent power,²⁵ even then, after the federal government had acted, of course, state regulation was superseded. But in the course of time the United States Supreme Court held that where the subject of interstate commerce was national in scope or admitted of only one uniform plan of regulation, the power to regulate it was an exclusive power of Congress and the states had no power,²⁶ and this exclusive power of Congress extended so long as the goods were in the original package.²⁷ This, of course, placed very important limitations upon any social control of interstate commerce by the states.

²⁴ *Brown v. Maryland* (1827), 12 Wheat. 419.

²⁵ *Wilson v. Black Bird Creek Marsh Co.* (1829), 2 Pet. 245.

²⁶ *Cooley v. Board of Port Wardens* (1851), 12 How. 299; *Leisy v. Hardin* (1890), 135 U. S. 100.

²⁷ *Austin v. Tennessee* (1900), 179 U. S. 343.

More recently the Supreme Court has allowed the states the privilege of exercising a general police power for the purpose of protecting some of the general social interests of the state, even though such police power incidentally or indirectly regulated interstate commerce.²⁸ But even now the Supreme Court will not allow a state to take jurisdiction of a transitory cause of action against a non-resident corporation not doing business in the state.²⁹ Unified federal control favors corporations doing business in a number of states, because it protects them against the diversity (precedents) of social control in the many states.

So far as taxation is concerned, the Supreme Court has held that the states must not tax interstate commerce,³⁰ but, for some reason, the Supreme Court did not apply the original package doctrine to interstate commerce so far as concerns taxation. As a consequence a state may levy a tax upon goods while they are still in the original package after they have come to rest in the state.³¹

So far as state action is concerned, therefore, both in the matter of the police power and the matter of taxation, capitalism has received protection against state action and therefore has not received direction by state action.

Of course, where the federal government has protected capitalism from state action, it, itself, has had the power to regulate and to tax both foreign commerce and interstate commerce. It has taxed foreign commerce but it has not thus far taxed interstate commerce. However, it has regulated interstate commerce to a considerable extent, and in so doing has, of course, given more direction to capitalism than it has protection. In that connection, it has regulated the liability of employers engaged in interstate commerce,³² and the transportation of lottery tickets,³³ of women for immoral purposes,³⁴ and of impure food

²⁸ *Plumley v. Massachusetts* (1894), 155 U. S. 461; *Plessy v. Ferguson* (1896), 163 U. S. 537; *Patapsco v. North Carolina* (1898), 171 U. S. 345; *Lake Shore, etc., Co. v. Ohio* (1899), 173 U. S. 285; *Minnesota Rate Cases* (1913), 230 U. S. 352.

²⁹ *Davis v. Farmers, etc., Co.* (1923), 262 U. S. 312.

³⁰ *Case of the State Freight Tax* (1872), 15 Wall. 232.

³¹ *Brown v. Houston* (1885), 114 U. S. 622; *Texas v. Brown* (1922), 258 U. S. 466.

³² *Second Employers Liability Cases* (1912), 223 U. S. 1.

³³ *Lottery Cases* (1903), 188 U. S. 321.

³⁴ *Hoke v. United States* (1913), 227 U. S. 308.

and drugs,³⁵ in interstate commerce; and in regulating the rates of railroads it has permitted the Interstate Commerce Commission to regulate the rates for intrastate commerce as well as interstate commerce where interblended.³⁶ But more recently it refused to uphold a child labor law prohibiting the transportation in interstate commerce of products mined or manufactured by establishments employing children under specified ages.³⁷

So far as intrastate commerce is concerned, the states theoretically are given a free hand, but the states' power may have to yield to federal power where interstate and intrastate commerce are interblended and the states' power may be limited by other clauses in the Constitution. Where such limitations occur the state police power is limited, unless it can require the giving up of such constitutional protection as a condition of a grant of some privilege. Some constitutional limitations cannot thus legally be relinquished. A state may not, for example, require a corporation to agree not to remove to the federal courts suits arising within the state,³⁸ nor assent to a tax which, unduly burdens interstate commerce,³⁹ nor consent to a tax upon property permanently situated outside the state,⁴⁰ nor consent to become a common carrier instead of a private carrier as a condition to the use of the public highways.⁴¹ But a state may require a pipe line company to assume the duties of a common carrier as a condition for the grant of eminent domain,⁴² require a public utility company, as a condition of obtaining a franchise, to bargain away its right to object to confiscatory rates,⁴³ and require a public utility corporation, in return for its privilege, to make a valid contract to continue in operation in spite of the fact that but for the contract the Constitution would permit it to surrender its franchise and cease operation.⁴⁴ In other words, the states, through the exercise of their bargaining power, may ap-

³⁵ *Hipolite Egg Co. v. United States* (1911), 220 U. S. 45; *McDermott v. Wisconsin* (1913), 228 U. S. 115.

³⁶ *Houston v. United States* (1914), 234 U. S. 342.

³⁷ *Hammer v. Dagenhart* (1918), 247 U. S. 251.

³⁸ *Terral v. Burke Constr. Co.* (1922), 257 U. S. 529.

³⁹ *Looney v. Crane Co.* (1917), 245 U. S. 178.

⁴⁰ *Western Union Telegraph Co. v. Kansas* (1910), 216 U. S. 1.

⁴¹ *Frost v. R. R. Comm. of Calif.* (1926), 271 U. S. 583.

⁴² *Pierce Oil Co. v. Phoenix Refin. Co.* (1922), 259 U. S. 125.

⁴³ *St. Cloud Pub. Serv. Co. v. St. Cloud* (1924), 265 U. S. 352.

⁴⁴ *Bullock v. Florida* (1921), 254 U. S. 513; *Transit Comm. v. United States* (1932), 284 U. S. 360.

parently exercise some social control which would otherwise be unconstitutional. In determining how far this bargaining power may go, perhaps the safest generalization is that it will not be allowed to be exercised where it will allow the states to encroach either upon the federal government or upon another state government, but it will be allowed to be exercised where only the interests of individuals are concerned.⁴⁵

IMPORTS AND EXPORTS

Capitalism is, of course, protected by the original Constitution against the taxation of its imports from or exports to a foreign country by any of the states of the United States, and against the taxation of exports to a foreign country by the United States; and the Supreme Court has held that the states' power of taxation of imports does not begin so long as the goods imported are still in the original package.⁴⁶ Of course, the states' police power also cannot be exercised during this time. Singularly, however, the states are permitted to tax goods shipped in interstate commerce though they are still in the original package after they have come to rest in the state,⁴⁷ although the original package doctrine has been extended to interstate commerce so far as concerns police power.⁴⁸

SLAVES

There are a number of provisions in the original Constitution protecting the former slave owners in their property in the slaves. In the case of *Dred Scott v. Sandford*,⁴⁹ the United States Supreme Court undertook to solve the slavery problem which then existed in the United States by extending even further protection to the property of slave holders in their slaves by holding that it was impossible for a slave to become a citizen of the United States, but this decision was overruled by the Civil War. However, although this particular kind of protec-

⁴⁵ Harding, *Taxation of Shares in Domestic Corporations*, 27 Ill. L. Rev. 894-898.

⁴⁶ *Brown v. Maryland* (1827), 12 Wheat. 419.

⁴⁷ *Brown v. Houston* (1885), 114 U. S. 622.

⁴⁸ *Austin v. Tennessee* (1900), 179 U. S. 343.

⁴⁹ (1857), 19 How. 393.

tion of property was abolished, the general protection of property continued.

INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE

By the interstate privileges and immunities clause, each state of the United States is required to give to the citizens of every other state all the fundamental rights, powers, privileges and immunities which it gives to its own citizens. This gives important protection to the citizens of other states than the one passing the laws.⁵⁰ Yet, it has been held that a state, even under this limitation, may make certain reasonable conditions as to require a bond as a condition for suit in the state courts,⁵¹ or as to fishing in its waters for property which is really vested in the state,⁵² and it may wholly deny the privilege of suing in its state courts on the theory of *forum non conveniens*.⁵³ A corporation, however, has not as yet been given the protection of the interstate privileges and immunities clause.

UNITED STATES PRIVILEGES AND IMMUNITIES CLAUSE

After the adoption of the Fourteenth Amendment in the period of the ascendancy of Justice Miller and Chief Justice Waite, the United States Supreme Court came very close to putting a further limitation upon the powers of the state and thereby indirectly further protecting the capitalistic system under the clause forbidding a state's abridging "the privileges or immunities of citizens of the United States." But by a vote of five to four, the United States Supreme Court decided not to take this action.⁵⁴ In doing so, it limited the privileges and immunities of citizens of the United States protected against abridgement by the states to "those which owe their existence to the federal government, its national character, its constitution, or its laws as distinguished from those of citizens of a state, as, for example, the right of free access to seaports; pro-

⁵⁰ *Blake v. McClung* (1898), 172 U. S. 239; *Douglas v. New York* (1929), 279 U. S. 377.

⁵¹ *Ownbey v. Morgan* (1921), 256 U. S. 94.

⁵² *Corfield v. Coryell* (1825), 4 Wash. C. C. 371.

⁵³ *Rogers v. Guaranty Co.* (1933), 53 S. Ct. 295; 46 Harv. L. Rev. 193.

⁵⁴ *Slaughter-House Cases* (1872), 16 Wall. 36; *Civil Rights Cases* (1883), 109 U. S. 3.

tection on the high seas; the right of assemblage and petition; the right to sue in the federal courts; the privilege of the writ of *habeas corpus*; the right to use navigable waters; the right to become a citizen of any state by residence; and the privilege not to have unequal tax laws." Justice Field and three of his associates were strong dissenters. If the dissenting judges had had their way, the privileges and immunities of United States citizens might have included all the fundamental civil rights, both those arising at common law and those given by the Constitution. In such case, of course, freedom of contract would have been protected by the United States privileges and immunities clause.

But again freedom of contract failed to receive the protection for which Justice Field and many other lawyers in the United States were fighting. It had to wait for Justice Field to come into the ascendancy in the United States Supreme Court, and to have the due process clause stretched to do the work for which the Supreme Court refused to stretch the contract clause and the United States privileges and immunities clause. Before this could be done, the due process clause had to be extended to matters of substance, which was not until the nineties. However, in the case of *Hepburn v. Griswold*,⁵⁵ by a five to three vote, the due process clause was prematurely extended to the protection of matters of substance, so as to protect creditors against the retroactive legislation found in the Legal Tender Acts; but since this case was almost immediately overruled, it will have to be disregarded in this discussion.

THE EQUALITY CLAUSE

The equality clause also has had some relation to the growth of our capitalistic system. Of course, it has always been the doctrine of the United States Supreme Court that the equality clause forbade class legislation but did not prohibit classification, which, of course, meant that before any classification could be upheld the Supreme Court would have to be given, or find, some reason for it. In the earlier history of the work of the Supreme Court, the Court put a greater limitation upon legislation and gave more protection to capitalism than it did later, although there have been sporadic decisions contrary to these

⁵⁵ (1869), 8 Wall. 603.

general tendencies all through our history. Thus, in the matter of the police power, it was held, in *Gulf, etc., Co. v. Ellis*,⁵⁶ that it was not proper classification to put railways in one class and all other persons in another class for the prompt payment of small claims; but in *Seaboard Air Line Ry. v. Seegers*,⁵⁷ it was held proper classification to put common carriers into one class and all other persons into another class for a penalty for the non-payment of claims when recovery in full was finally allowed by the court. And in a number of other cases it has been held that it is proper classification to put railways in one class and all other persons in another class.⁵⁸ Again, it has been held that it is not proper classification to put aliens in one class and all other persons in another class for the purpose of licensing the business of peddling,⁵⁹ or for the purpose of employment (in restaurants),⁶⁰ but that it is proper classification to put aliens in one class and all others in another class for the purpose of operating poolrooms,⁶¹ or for the purpose of owning land.⁶²

In the matter of taxation the Supreme Court early held it proper classification to put into one class for a local assessment the property especially benefitted and into another class all other property, but it at first held that there must be a very definite relation between the amount of the assessment and the amount of the special benefit.⁶³ More recently it has held that there need be very little relation between the amount of the assessment and the amount of the benefits.⁶⁴ In the case of *Quaker, etc., Company v. Pennsylvania*,⁶⁵ the Supreme Court held that it was not proper classification to put a corporation in one class and all others in another for the taxi-cab business, but in *State Board of Indiana v. Jackson*,⁶⁶ it held it proper classification to

⁵⁶ (1897), 165 U. S. 150.

⁵⁷ (1907), 207 U. S. 73.

⁵⁸ *Atchison, etc., Company v. Matthews* (1899), 174 U. S. 96; *Missouri, etc., Co. v. May* (1904), 194 U. S. 267; *Mobile, etc., Co. v. Turnipseed* (1910), 219 U. S. 35.

⁵⁹ *Commonwealth v. Hana* (1907), 195 Mass. 262.

⁶⁰ *Truax v. Raich* (1915), 239 U. S. 33.

⁶¹ *Ohio v. Deckebach* (1927), 274 U. S. 392.

⁶² *Terrace v. Thompson* (1923), 263 U. S. 197.

⁶³ *Norwood v. Baker* (1898), 172 U. S. 269.

⁶⁴ *French v. Barber Asphalt Paving Co.* (1901), 181 U. S. 324; *Butters v. City of Oakland* (1923), 263 U. S. 162; *Roberts v. Richland* (1933), 53 S. Ct. 519.

⁶⁵ (1928), 277 U. S. 389.

⁶⁶ (1931), 283 U. S. 527.

put chain stores into one class and all others into another class for the purpose of graduated license fees. Yet, it soon thereafter held that it was not proper classification to assess certain property at one hundred per cent of its actual value and other property at fifty per cent.⁶⁷

From these few illustrations, it is apparent that the equality clause has had some effect upon the development of our capitalistic system in the United States. It has not necessarily impeded its development, but it has more or less directed its development. It has prevented governments from doing many things to interfere with the capitalistic system, but it has also been quite liberal in allowing the governments to proceed against various social classes without proceeding against all.

DUE PROCESS CLAUSE

The great judicial control of the capitalistic system with its emphasis upon property and freedom of contract and its corporation technic has come through the due process clause of the United States Constitution. What dissenting judges and corporation lawyers tried to obtain through the contract clause and the privileges and immunities clause and, to some extent, the equality clause was at last finally achieved through the due process clause. The one man who more than any other man was entitled to the credit for this achievement was Justice Field of the United States Supreme Court. He had an economic orientation and almost occult prevision of capitalistic needs. Under him capitalistic development weighted the judicial scales. But the court chose business rather than agrarian interests. The economic dogma was *laissez faire* which led to monopoly. The legal dogma was due process which led to *laissez faire*. In this period, the work of the United States Supreme Court was creative, though perhaps not socially wise. Field's theory was developed and applied by the court to give positive direction to capitalistic development.⁶⁸

FREEDOM OF CONTRACT

Freedom of contract is a rather recent notion. It is a phase of Adam Smith's doctrine of *laissez faire*. As we have already

⁶⁷ *Cumberland Coal Co. v. Board of Revision* (1931), 284 U. S. 23.

⁶⁸ Swisher, *Stephen J. Field, Craftsman of the Law*.

seen, Marshall, of course, hinted at it. The cause or origin of the notion is to be found in the individualistic justice which formerly obtained in Anglo-American law, a justice which emphasized property and contract, mechanical jurisprudence, the jurisprudential concepts of the state and economics, the tyranny of the judges, natural law, and the division of law from the facts, and forgot the early labor legislation.⁶⁹ It had a peculiar appeal to Justice Field, who, as a Puritan and a Frontiersman, would naturally believe in this sort of individualism. His position was eloquently presented in the case of *Butchers' Union, etc., Co. v. The Crescent City, etc., Co.*,⁷⁰ in which case he used his own dissenting argument in the Slaughter-House cases,⁷¹ to the effect that there are certain inherent rights of individuals, like livelihood and freedom of contract, which are beyond the exercise of public authority. This argument affected later state decisions and finally the United States Supreme Court decision in *Lochner v. New York*.⁷²

Before the Fourteenth Amendment, the due process clause found in the Fifth Amendment was rarely invoked, but the due process clause of the Fourteenth Amendment has brought more business to the United States Supreme Court than any other part of the Constitution, and by virtue of it the Supreme Court has exercised a power perhaps never before exercised by a legal tribunal. The due process clause of the Fourteenth Amendment has given the United States Supreme Court power over the states; the Fifth Amendment, power over the federal government. Otherwise, the clauses have the same scope.

LEGAL PROCEDURE

At first, the Supreme Court applied the due process clause only to matters of procedure,⁷³ and it intimated that the due process clause of the Fourteenth Amendment was only a pro-

⁶⁹ Pound, *Liberty of Contract*, 18 Yale L. Jour. 454.

⁷⁰ (1884), 111 U. S. 746.

⁷¹ (1872), 16 Wall. 36.

⁷² (1905), 198 U. S. 45. This case has now been impliedly overruled and many other limitations placed on freedom of contract, as, for example, by making voidable any settlement of a personal injury claim within thirty days after the date of injury to stop ambulance chasing, etc. 31 Mich. L. Rev. 847.

⁷³ *Bank of Columbia v. Okely* (1819), 4 Wheat. 235; *Munn v. Illinois* (1876), 94 U. S. 113.

tection to the negroes as a class.⁷⁴ But, of course, the protection of the due process clause, so far as it concerns legal procedure, was soon extended to natural persons. As time went on, it at first seemed as though the Supreme Court was going to be more and more liberal as to what would amount to due process of law as a matter of procedure and the court upheld new forms of legal procedure like information instead of indictment,⁷⁵ and a jury of eight instead of a jury of twelve,⁷⁶ for to hold otherwise the court said "would be to deny every quality of the law but its age."

Such a tendency would have given more limitation than protection to our capitalistic system, but in subsequent developments of the requirements of due process so far as concerns legal procedure, the Supreme Court has placed its limits on social control more than upon capitalism. It has now, for one thing, been established that due process of law as a matter of procedure requires an impartial tribunal always,⁷⁷ and where a question of jurisdiction or a question of fundamental substance is involved, whether it is a question of fact or law, a judicial tribunal;⁷⁸ and in such case, the Supreme Court has held that a trial *de novo* must be granted.⁷⁹ For another thing, it has now been established that jurisdiction is required, although now, apparently, jurisdiction may be based on allegiance,⁸⁰ and on either consent or propriety and convenience.⁸¹ Due process of law, as a matter of legal procedure, also requires notice and an opportunity to be heard, with a few small exceptions as in the case of poll taxes and the destruction of property of trifling value.⁸² Notice, to be sufficient, must apprise the defendant of the nature of the proceeding and afford him a sufficient opportunity to answer but notice on the Secretary of

⁷⁴ *Slaughter-House Cases* (1872), 16 Wall. 36; *Strauder v. West Virginia* (1880), 100 U. S. 303.

⁷⁵ *Hurtado v. California* (1884), 110 U. S. 516.

⁷⁶ *Maxwell v. Dow* (1900), 176 U. S. 581.

⁷⁷ *Tumey v. Ohio* (1927), 273 U. S. 510.

⁷⁸ *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U. S. 287; 21 Calif. Law Rev. 266.

⁷⁹ *Crowell v. Benson*, 46 Harv. L. Rev. 478; 41 Yale L. Jour. 1037; 80 Univ. of Pa. L. Rev. 1055.

⁸⁰ *Blackner v. United States* (1932), 284 U. S. 421; 30 Mich. L. Rev. 137.

⁸¹ *Rogers v. Guaranty Co.* (1933), 53 S. Ct. 295; 81 Univ. of Pa. L. Rev. 635; 17 Minn. L. Rev. 146; 31 Col. L. Rev. 679.

⁸² *Lawton v. Steele* (1894), 152 U. S. 133.

State, provided notice is also mailed is sufficient wherever jurisdiction can be acquired by consent or under the doctrine of propriety and convenience.⁸³ Opportunity to be heard requires a fair chance to present one's case at some stage in the proceedings to some governmental tribunal, and, in the case indicated above, before a judicial tribunal without the imposition of onerous conditions.⁸⁴ Due process of law also requires an orderly course of procedure. This does not mean procedure sanctioned by settled usage, although, of course this is valid,⁸⁵ for new methods of procedure are as much due process as old methods,⁸⁶ and it does not include jury trial⁸⁷ nor protection against testifying against oneself,⁸⁸ nor a correct decision;⁸⁹ but it does require that the tribunal must be honest,^{89a} not dominated by a mob,⁹⁰ that a person shall not be denied or hindered access to the courts,⁹¹ and that he shall have the right to counsel.⁹² Due process, as a matter of procedure, applies as a limitation on administrative tribunals⁹³ and upon judicial tribunals,⁹⁴ but not upon legislative tribunals,⁹⁵ and to any agency of the government, as to a political party where it is performing a governmental function.⁹⁶

SUBSTANCE

The direction given to our capitalistic system by the United States Supreme Court under due process as a matter of legal procedure has been, however, nothing as compared to the di-

⁸³ *Wuchter v. Pizzutti* (1928), 276 U. S. 13.

⁸⁴ *Anthony v. Syracuse University* (1927), 223 N. Y. S. 796; *Ownbey v. Morgan* (1921), 256 U. S. 94.

⁸⁵ *Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co.* (1931), 284 U. S. 151.

⁸⁶ *Hurtado v. California* (1884), 110 U. S. 516.

⁸⁷ *Jordan v. Massachusetts* (1912), 225 U. S. 167; 6 N. Car. L. Rev. 77.

⁸⁸ *Twining v. New Jersey* (1908), 211 U. S. 78.

⁸⁹ *Central Land Co. v. Laidley* (1895), 159 U. S. 103.

^{89a} *Fallbrook Irrigation Dist. v. Bradley* (1896), 164 U. S. 112.

⁹⁰ *Frank v. Mangum* (1915), 237 U. S. 309; *Moore v. Dempsey* (1923), 261 U. S. 86.

⁹¹ *Ex parte Young* (1908), 209 U. S. 123.

⁹² *Powell v. Alabama* (1932), 53 S. Ct. 55.

⁹³ *Porter v. Investors' Syndicate* (1932), 286 U. S. 461; 80 Univ. of Pa. L. Rev. 96, 878.

⁹⁴ *Baldwin v. Iowa, etc., Assoc.* (1931), 283 U. S. 522.

⁹⁵ *Norwegian, etc., Co. v. United States* (1933), 53 S. Ct. 350; 33 Col. L. Rev. 528.

⁹⁶ *Nixon v. Condon* (1932), 286 U. S. 73; 21 Cal. L. Rev. 62.

rection it has given to it under due process as a matter of substance. For long years after the adoption of the Fourteenth Amendment, the majority of the Supreme Court refused to extend the due process clause to matters of substance. Of course, Justice Field and some of his associates dissented and in the course of time the dissenting judges came into power in the United States Supreme Court. The extension of the due process clause to matters of substance has an interesting history. It perhaps had its origin in Coke's dictum, that there are certain fundamental principles of the common law which are paramount over legislation.⁹⁷ Before the United States Supreme Court thought of extending due process to matters of substance it did intimate that it would set aside, and in three cases actually did set aside, legislation because in violation of what Coke called the fundamental principles of the common law.⁹⁸ Finally, in the case of *Davidson v. New Orleans*,⁹⁹ the Supreme Court merged Coke's dictum with due process of law and thus extended due process of law to the protection of matters of substance, and since that time this case has been followed in a long line of cases; and in the nineties, as a result of the triumph of Justice Field and his associates, the protection of due process as a matter of substance was extended to the property rights of corporations.¹⁰⁰ It has been contended that this protection against social control applies only against the legislative branches of government, but it would seem that if the protection of due process is to be extended at all to matters of substance, it should be extended against all the various branches of government.¹⁰¹

⁹⁷ *Dr. Bonham's Case* (1610), 8 Co. 118a; overruled by *Lee v. Bude, etc., Ry.* (1871), L. R. 6 C. P. 576, 582.

⁹⁸ *Calder v. Bull* (1798), 3 Dall. 386; *Fletcher v. Peck* (1810), 6 Cranch 87, 135; *Terrett, et al. v. Taylor, et al.* (1815), 9 Cranch 43, 50; *Wilkinson v. Leland* (1829), 2 Pet. 627, 657; *Webster v. Reid* (1851), 11 How. 437, 440; *Pacific Mail Stm. Co.* (1854), 17 How 596; *Loan Assn. v. Topeka* (1875), 20 Wall. 655, 662; 6 Wis. L. Rev. 67.

⁹⁹ (1877), 96 U. S. 97.

¹⁰⁰ *Hurtado v. California* (1883), 110 U. S. 516; *Santa Clara Co. v. Southern Pac. R. Co.* (1886), 118 U. S. 394; *Minneapolis Ry. Co. v. Beckwith* (1889), 129 U. S. 26; *Chicago, etc., Co. v. Minnesota, etc., Com.* (1890), 134 U. S. 418; *Scott v. McNeal* (1894), 154 U. S. 34; *Reagan v. Farmers' Loan and Trust Co.* (1894), 154 U. S. 362; *Covington v. Sanford* (1896), 164 U. S. 578; *C. B. & Q. Ry. v. Chicago* (1897), 166 U. S. 226, 241; *Dewey v. Des Moines* (1899), 173 U. S. 193; *Roller v. Holly* (1900), 176 U. S. 398.

¹⁰¹ *Chicago B. & Q. R. Co. v. Chicago* (1897), 166 U. S. 226; *Ex parte Virginia* (1879), 100 U. S. 339.

While Field succeeded permanently in extending the due process clause to matters of substance and temporarily in protecting rather than limiting the property rights of corporations, he could not permanently dominate the attitude of the Supreme Court, and consequently, we find the Court sometimes protecting and sometimes limiting such rights.

PUBLIC UTILITIES

In the case of *Munn v. Illinois*,¹⁰² perhaps as a result of the Granger Movement, the United States Supreme Court put some very important limitations upon our capitalistic system as it had then developed. In that case, the United States Supreme Court applied to all of those businesses which it classified as businesses affected with a public interest the law called the law of public callings, which had been developed in the period of equity but which had in the period of maturity been more or less superseded by the law of contracts and the rule of freedom of contract. According to this law of public callings, any business affected with a public interest was held bound to serve everybody of the class of service with reasonably adequate facilities without discrimination and for reasonable compensation. This apparently threatened to give a new and very different direction to a large part of our corporate and business development in the United States, and it certainly gave the United States Supreme Court the power to say both what business and what government could do with respect to businesses affected with a public interest. But in subsequent cases, the United States Supreme Court limited the test of virtual monopoly for determining when a business is affected with a public interest to the test of a virtual monopoly in an indispensable service,¹⁰³ and it adopted as the bases for determining what is reasonable compensation a net rate of return of as high as seven or eight per cent¹⁰⁴ and a rate base very largely tied up with reproduction cost.¹⁰⁵ As a result of its emphasis upon reproduction cost, the practical effect of

¹⁰² (1876), 94 U. S. 113.

¹⁰³ *Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522; *Tyson v. Banton* (1927), 273 U. S. 418; *Tagg Brothers v. United States* (1930), 280 U. S. 420; *New State Ice Co. v. Liebmann* (1932), 285 U. S. 262.

¹⁰⁴ *Bluefield Water Works v. Public Serv. Com.* (1923), 262 U. S. 679; *United Railways Co. of Baltimore v. West* (1930), 280 U. S. 234.

¹⁰⁵ *McCardle v. Indianapolis Water Co.* (1926), 272 U. S. 400; *St. Louis and O'Fallon Ry. Co., et al. v. United States* (1929), 279 U. S. 461.

the decisions of the United States Supreme Court has been to give the public utilities since the World War a rate base about twice what they prudently invested in the business. This was largely due to the deflation of our currency, and inflation might tend to have the opposite effect. As a result of the adoption of the high rate of return, a rate of return almost twice what businesses of like stability have to pay for money borrowed, the public utilities have indulged in high finance and created holding companies to such an extent as almost to defeat the purpose of governmental regulation of public utilities.¹⁰⁶ However, very recently the United States Supreme Court has seemed to take a position more favorable to social control and less favorable to public utilities. In the case of *Smith v. Illinois Bell Telephone Co.*¹⁰⁷ the Supreme Court held that commissions in regulating the rates of public utilities might consider the relation which the local public utility had with holding companies, and in the case of *Stephenson v. Binford*,¹⁰⁸ it held that private contract carriers might be required to take out certificates of convenience and necessity and that their charges might be regulated. This case either overruled the cases holding that a private carrier could not be made a common carrier because it would be a violation of the due process clause,¹⁰⁹ or the cases holding that it was not due process of law to apply this form of social control outside of businesses affected with a public interest,¹¹⁰ or held that private contract carriers could be made public callings but not common carriers, when, of course, no earlier cases would have to be overruled. But whatever the rationalization of this case, the Supreme Court has authorized the application of social control to private contract carriers in such a way as they have never had it before.

HOURS OF LABOR

In the case of *Holden v Hardy*,¹¹¹ the United States Supreme Court thought the social interest in health sufficient to warrant the limitation of hours to eight for men employed to

¹⁰⁶ Willis: *Social Control of Businesses Affected with a Public Interest*, 20 Ind. Univ. Alumni Quarterly 1-14.

¹⁰⁷ (1930), 282 U. S. 133.

¹⁰⁸ (1932), 53 S. Ct. 181.

¹⁰⁹ *Frost, etc., Co. v. Commission of California* (1926), 271 U. S. 583; *Smith v. Calhoun* (1931), 283 U. S. 553.

¹¹⁰ *Williams v. Standard Oil Co.* (1929), 278 U. S. 235.

¹¹¹ (1898), 169 U. S. 366.

work in underground mines, and in *Atkin v. Kansas*,¹¹² it held that the limiting of the number of hours of employees working on public work was valid. When the personnel of the court was slightly reconstituted, a new alignment of the members of the court, by a five to four decision,¹¹³ held that there was not sufficient interest in health to warrant limiting the hours of labor of employees in bakeries to ten hours a day. Then the state courts held that ten hour day laws for children under sixteen were constitutional,¹¹⁴ although the United States Supreme Court later held a federal child labor law under the interstate commerce clause was unconstitutional because it invaded the jurisdiction of the state under our dual form of government,¹¹⁵ and a federal child labor law under the taxing power unconstitutional because Congress does not have the power to regulate in the guise of taxation.¹¹⁶ And once again the Supreme Court of the United States, in *Muller v. Oregon*,¹¹⁷ held that it was reasonable to regulate the hours of labor for women in mechanical establishments, factories, or laundries; and, finally, in *Bunting v. Oregon*,¹¹⁸ that it was reasonable to regulate the hours of men in mills, factories, or manufacturing establishments. Thus, the Supreme Court at last, apparently, placed rather substantial limitations upon the freedom of the capitalistic system.

MINIMUM WAGES

But the social control of the capitalistic system permitted under the decisions on hours of labor has been more apparent than real. So long as the wages of employees are not regulated, the regulation of the hours of labor is not especially significant. The United States Supreme Court at first seemed inclined to uphold the regulation of wages. In the case of *McLean v. Arkansas*,^{118A} it upheld a statute making it a crime for a mine employing ten men to use a screen to reduce wages paid. In

¹¹² (1903), 191 U. S. 207.

¹¹³ *Lochner v. New York* (1905), 198 U. S. 45.

¹¹⁴ *State v. Shorey* (1906), 48 Ore. 396.

¹¹⁵ *Hammer v. Dagenhart* (1918), 247 U. S. 251.

¹¹⁶ *Bailey v. Drexel Furniture Co.* (1922), 259 U. S. 20.

¹¹⁷ (1908), 208 U. S. 412.

¹¹⁸ (1917), 243 U. S. 426.

^{118A} (1909), 211 U. S. 539.

Wilson v. New,¹¹⁸ it upheld the federal Adamson Act permanently applying an eight-hour standard for work and wages which had been in existence on about fifteen per cent of the railroads, and in the case of *Stettler v. O'Hara*,¹¹⁹ by an evenly divided court, the Supreme Court upheld a minimum wage law. But in the case of *Adkins v. Children's Hospital*,¹²⁰ the Supreme Court finally and definitely held that an act of Congress providing for minimum wages for women and minors in the District of Columbia was unconstitutional because there was no sufficient social interest to warrant such a limitation of the personal liberty of business men. Perhaps the better explanation for this decision is the United States' taboo against price fixing, which was evidently stronger than any social interest in health. However, in the recent case of *O'Gorman and Young v. Hartford Fire Ins. Co.*,¹²¹ the Supreme Court held that it was constitutional to regulate the wages of insurance brokers, so that it appears that the unconstitutionality of minimum wage legislation is not entirely foreclosed.

LABOR LEGISLATION

In the case of *Adair v. United States*,¹²² the Supreme Court held that the right of freedom of contract could not be abridged by legislation making it unlawful to threaten an employee with loss of employment because of membership in a labor union, and in the case of *Coppage v. the State of Kansas*,¹²³ that the right to require the so-called "yellow-dog" contracts could not be limited. But in the case of *Texas, etc., Co. v. Brotherhood, etc.*,¹²⁴ it upheld the provision as to collective bargaining found in the Railroad Labor Act of 1926. These decisions would indicate that at first the Supreme Court's position was one to protect the capitalistic system, but that now it is beginning to assume a position where it would limit the freedom of the capitalistic system.

(To be concluded in the May, 1934, issue of the
Kentucky Law Journal)

¹¹⁸ (1917), 243 U. S. 332.

¹¹⁹ (1917), 243 U. S. 629.

¹²⁰ (1923), 261 U. S. 525; 37 Harv. L. R. 545.

¹²¹ (1931), 282 U. S. 251.

¹²² (1908), 208 U. S. 161.

¹²³ (1915), 236 U. S. 1; 6 Wis. L. Rev. 21.

¹²⁴ (1930), 281 U. S. 548.